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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 42

INTERNATIONAL SHOE COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION.

REPLY BRIEF OF THE INTERNATIONAL SHOE COMPANY TO THE BRIEF FOR THE FEDERAL TRADE COMMISSION FILED APRIL 5, 1929.

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(34,027)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 718.

INTERNATIONAL SHOE COMPANY, PETITIONER,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF OF THE INTERNATIONAL SHOE COMPANY TO THE BRIEF FOR THE FEDERAL TRADE COMMISSION FILED APRIL 5, 1929.

The Petitioner does not agree with the Respondent that only two questions of law are presented, but says that, in addition to the two suggested by the Respondent, the following are presented:

A.

Where the undisputed evidence is that no substantial competition exists between two manufacturers, is the purchase of the share capital of one by the other a violation of the Clayton Act?

B.

At the time of the acquisition of the share capital of one corporation by another, if its financial condition is such that it can not continue to carry on its business but is faced with a liquidation or sale of its assets, then is the purchase of such share capital, with no consequences inimical to the public interest, a violation of Sec. VII of the Clayton Act?

C.

The interpretation of Sec. VII of the Clayton Act by the Circuit Court of Appeals for the First Circuit is in direct conflict with interpretation of Sec. VII of that act by the Circuit Court of Appeals in the case of Federal Trade Commission *v.* Thatcher Mfg. Co., 5 Fed. (2d) 622, paragraphs 6 and 7, which case was affirmed by this Court in 272 U. S. at p. 560. Such decision is also in effect in conflict with the decision of the Circuit Court of Appeals in the case of American Press Association *v.* United States, 245 Fed. 91, and the decision of this Court in the case of United States *v.* United States Steel Corporation, 251 U. S. 417, 1. c. 446, 447.

D.

Where the undisputed evidence shows that the transaction between the two corporations, though in form a stock purchase, is to acquire additional factories and facilities, the additional plants to be operated as a subsidiary of the purchasing corporation, then is such purchase prohibited under Sec. VII of the Clayton Act?

E.

Does not the purchase of the entire share capital of a corporation by another, where it is making such investment for the purpose of increasing its own facilities and not for the purpose of lessening competition, come within Par. 3 of Sec. VII of the Clayton Act and not within Par. 1, where the effect of the purchase is not to restrain commerce and does not tend to create a monopoly?

F.

The evidence in this case as to no substantial competition and insolvency being undisputed, the effect of that evidence presents a question of law not of fact.

Statement.

Counsel for petitioner desires to take issue with the Circuit Court of Appeals on the statement in its opinion "It is not seriously contended that any of the find-

ings of fact of the Commission are unsupported by the testimony."

Petitioner did seriously contend, in paragraphs 3, 5, 6, 7 and 8 of its petition to review the order of the Commission, that its findings as to competition and solvency were without support in the evidence (R. 17, 18, 19, 20, 21), and the same contentions are urged here.

The statements of evidence by counsel for the respondent in their brief are not altogether accurate, and for that reason further statements of the evidence will be made.

At the time of the purchase by the International Shoe Company, the W. H. McElwain Company was not the largest shoe manufacturer in New England. It had been, but at the time of its purchase it was not operating in excess of 28 per cent of capacity and since the previous October its operations had varied from 10 per cent to 30 per cent of capacity (R. 176, 177, 294).

The W. H. McElwain Company manufactured dress shoes for men and boys. It had not manufactured or sold dress shoes for misses (R. 283, 44).

The shoes of the International Shoe Company and the shoes of the McElwain Company were not similar in style, finish or appearance,and did not appeal to the same class of trade (R. 163, 171, 174, 358).

The McElwain Company in the manufacture of shoes used substitutes for leather in its counters, heels and (to some extent) in its inner soles. The International Shoe Company used no leather substitutes. The Mc-

Elwain shoes had a more attractive style, finish and appearance (R. 283, 352, 358).

There was no substantial competition between the two concerns (R. 105, 160, 165, 166).

There is no evidence in the record to justify the statement in the brief, on page 5, that immediately after it acquired stock of the McElwain Company in 1921, all competition between the two companies ceased. There is evidence that the International Shoe Company, after the purchase of the stock, sold the branch houses controlled by the McElwain Company or in which it was interested, to prevent further loss by the operation of such branches (R. 159, 160, 296, 297, 81, 105).

There was no effort whatever made by the International Shoe Company to conceal the sale of the stock to Bennett, Ltd., and the purchase of the assets of the McElwain Company by it, which was done in June, 1923, as stated on page 6 of the brief; but there was a publication made of the sale (R. 303). Also, Mr. King and Mr. Blake went to Washington on June 26, 1923, five days after the sale was consummated, saw one of the Federal Trade Commissioners, explained the details of that transaction in full in an hour and a half statement and answered all questions that were asked (R. 303).

The respondents are also inaccurate in their statement on page 17, wherein they say: "Moreover, the record shows that the McElwain Company's credit had not been restricted; that the McElwain Company had never defaulted in dividends on its first preferred or its second preferred stock."

W. H. Dwinnell, Vice President of the First National Bank of Boston, discussed the financial condition of the W. H. McElwain Company with the executives in 1921 and testified that such condition was very critical; that it was the intention of his bank to ask the McElwain Company to pay its loan, that had been gone over by the executive committee, the loan being a million dollars; that in his opinion it was impossible for them to get additional credit or additional capital and they could not have procured an extension of time for the payment of their then indebtedness; that they were faced with the sale of their assets or a liquidation receivership or bankruptcy (R. 338 to 345).

Mr. Stanley King, Vice President of the McElwain Company and Acting Treasurer at the time of the sale of its stock to the International Shoe Company, testified that the McElwain Company was practically insolvent; that upon publication of its balance sheet (required under the laws of Massachusetts) it would have been actually insolvent; that it was faced with the alternative of the sale of its assets or a liquidation (R. 287, 290).

Mr. King further testified that the merchandise and receivables in the statement of April 30, 1921, were over-valued to the extent of several million dollars (R. 305).

Mr. King testified (R. 223, in answer to Q. 125): "Default had been made in the payment of dividends on second preferred stock." It was with liquidation or sale confronting the McElwain Company that its

directors authorized King and McElwain to negotiate a sale of the Company (R. 287, 288).

The International Shoe Company knew nothing of the condition of McElwain Company or the proposed sale until King and McElwain appeared (R. 148, 149).

We desire to correct the statement of counsel for the respondent on page 18 of the brief:

> "The record clearly shows that the McElwain Company properties had been operated at a profit since petitioner acquired its stock."

The record affirmatively shows that between May 31, 1921, and November 30, 1921, there was a loss of $4,721,076.39 in the operation of the company and the liquidation of part of the McElwain assets (R. 206, 142).

See financial balance sheets quoted in petitioner's brief on p. 3.

The record does not show a profit for the McElwain Company between 1921 and 1923, or thereafter.

The purpose of the International Shoe Company in its acquisition of the McElwain properties was to obtain additional facilities for the manufacture of shoes to meet its requirements (R. 47, 56, 57, 58, 59, 158).

The record further shows that immediately after the International Shoe Company acquired the McElwain Company they converted some of the men's shoe factories into factories producing women's shoes and other factories producing girls' shoes, making a complete line of shoes for the International's requirements, and that the International operated the Mc-

Elwain Company as a part of their business along the lines they had experienced in distributing shoes under their trade name (R. 47).

The record further shows that the International Shoe Company gave orders to the McElwain Company immediately upon the acquisition and took from 56 to 58 per cent of the output of its factories for the International Shoe Company's sales branches (R. 198).

The record further discloses and the Commission found that the price of shoes had been lowered by petitioner.

ARGUMENT.

The International Shoe Company did not initiate the trade with McElwain Company; was not interested in lessening competition, for it had orders for more shoes than its factories could make. It needed additional factories fully manned to make such shoes. So when the McElwain executives approached the International executives, they decided to acquire the needed factories; and under the conditions existing allocated the purchase price to share capital in order to avoid breaking the factory management and operatives in the purchase.

Counsel for the Commission take the position that the purchase of the stock, no matter what its purpose, violated the Clayton Act and the existence of substantial competition is not required under Sec. VII. But how can there be a substantial lessening of competition unless there be substantial competition?

There is no violation of Sec VII if there be no competition—and certainly none was proven in this case except by inferences from the fact that both concerns manufactured shoes and both had done business in several States of the United States. Competition is a fact capable of proof by direct evidence. No witnesses were brought by the Commission to testify that competition did exist. There was not a merchant or customer of either concern, or any of the wholesale houses in which the McElwain Company was interested, called as a witness to testify that the merchandise of the two concerns was sold in competition. The witnesses who did testify, testified that there was no competition.

Had competition existed (which we do not concede in any degree), the testimony in the instant case shows that the McElwain Company was insolvent and that it was in a position where it was forced to liquidate or sell its assets. In this condition, how could the McElwain Company have been a competitor in the shoe business? It had several million dollars worth of shoes and no orders; it had eight million dollars of accounts on its books; which shoes and accounts, according to Mr. King's testimony, were over-stated as to value by several million dollars. It had approximately two and a half million dollars in cash. How could it pay seventeen million dollars of indebtedness? It is true it had some factories; but a sale of those factories to pay its debts, either under receivership or without it, would have put the McElwain Company out of competition and out of business and, as Commis-

sioner Humphrey in his dissenting opinion states, had the International Shoe Company been satisfied to wait sixty days the assets would have fallen in its lap at much less cost. The fact that the International Shoe Company made a bad trade and bought assets which were over-valued and over-stated and paid for them does not establish the solvency of the McElwain Company. The McElwain Company did not fail, but the International Shoe Company had to put up in excess of eleven million dollars to keep it from failing and lost seven or eight million dollars in the operation of the company. According to the Federal Trade Commission, the fact that the International Shoe Company made a bad trade and paid its debts made the McElwain Company solvent. The same view is taken by its counsel. They say McElwain Company could have continued if the International had not taken it over, but they do not suggest *HOW*, or in what medium the debts would have been paid.

There is another phase of this case to be considered, and that is that the International Shoe Company, having purchased all of the shares of stock of the McElwain Company for the purpose of procuring factories for the manufacture of its own line of shoes and immediately converted those factories into an integral part of its business and used them as a subsidiary, does not that take this entire case out of Par. 1 of Sec. VII of the Clayton Act and bring it within Par. 3 of Sec. VII? Is it not the investment by the International Shoe Company in additional factories to be used as a subsidiary not to restrain commerce? The

evidence is conclusive that shoes were manufactured according to International specifications, no substitutes for leather were used, and the shoes were sold through International branches and sales agencies.

The evidence further discloses that the price of shoes was lowered, the output of the McElwain factories was increased, six thousand operatives were put to work, competition was increased, the public was benefited, and a financial catastrophe was averted. No one was injured.

Can it be said that the purpose in the acquisition was to destroy competition or substantially lessen competition between the International and the McElwain Company? The evidence refutes the suggestion and shows that the purpose was not to offend the law in any particular.

Much comment is made in the brief of the respondent in reference to the sale of the stock acquired by the International Shoe Company to Bennett, Ltd., before the filing of the answer in this case and before the Federal Trade Commission acted on it. The comment is not justified, because: first, publicity was given in the newspapers to the transaction; and, second, the information was immediately conveyed to the Commission itself and a full report made of the transaction in June, 1923. In order for the Bennett, Ltd., transaction to be in any manner criticized it is necessary that the acquisition of the stock in the first place should have been an unlawful transaction. If the stock was lawfully acquired, nothing that the International Shoe Company could have done in the Ben-

nett, Ltd., transaction would have made the original transaction unlawful.

Respectfully submitted,

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